No. 09A648

IN THE

Supreme Court of the United States

DENNIS HOLLINGSWORTH, ET AL.,

Applicants,

v.

KRISTIN M. PERRY, ET AL.,

Respondents.

RESPONSE OF KRISTIN M. PERRY ET AL. TO APPLICATION FOR IMMEDIATE STAY

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TO THE HONORABLE ANTHONY M. KENNEDY, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE NINTH CIRCUIT:

Kristin M. Perry, Sandra B. Stier, Paul T. Katami, and Jeffrey J. Zarrillo ("Plaintiffs") respectfully submit this response to the Application for Immediate Stay of Proposition 8 Official Proponents ("Proponents").

The application should be denied because this case is a sound candidate for inclusion in the Ninth Circuit's pilot camera program. This case directly implicates the rights of the hundreds of thousands of gay and lesbian Californians whose right to marry was extinguished by Proposition 8 ("Prop. 8") – an arbitrary, irrational, and discriminatory measure that singles out gay and lesbian individuals for unequal treatment and excludes them from what this Court has recognized to be "the most important relation in life." *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (internal quotation marks omitted). There has been overwhelming public interest in this case since its inception. The district court's decision to include the case in the Ninth Circuit's pilot program is a reasonable—and lawful—means of providing the public with meaningful access to the trial proceedings and fostering public confidence in the outcome of this closely watched case. Because it is impossible to identify any basis on which Proponents could conceivably obtain this Court's review of that decision—and because Proponents would not suffer any irreparable harm from the recording of the trial proceedings for public distribution in other courtrooms and on the Internet—Proponents have not established that a stay is warranted.

I. STATEMENT OF FACTS AND PROCEDURAL HISTORY

Plaintiffs are gay and lesbian Californians who have filed suit in the United States District Court for the Northern District of California challenging Prop. 8—the California constitutional amendment that denies them the right to marry—under the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution. A trial on Plaintiffs' claims will commence tomorrow, Monday, January 11, 2010.

Proponents were responsible for placing Prop. 8 on the ballot, orchestrated a $40 million campaign to secure its passage, and have since touted their political victory in numerous public appearances and news articles. Proponents have also voluntarily intervened in this case. But now, on the eve of trial—and after months of notice that the trial may be videotaped and distributed publicly—Proponents seek to sharply limit the public's ability to witness the trial proceedings.

Chief Judge Walker's considered request to record the trial proceedings for public distribution in other courtrooms and on the Internet was reached after months of notice and many opportunities for all parties to be heard on the issue. In addition, that decision is the result of years of study and deliberation by the Ninth Circuit on the issue of broadcasting court proceedings. Indeed, as far back as 2007, the Ninth Circuit Judicial Council adopted a resolution recommending that the Judicial Conference of the United States endorse the broadcast of civil trials and recommending that the circuit "adopt a Rule that would allow the photographing, recording, and broadcasting of non-jury, civil proceedings before the District Courts in the Ninth Circuit." C.A. App. Ex. 5. And, the

Ninth Circuit itself has permitted the broadcast of oral arguments in cases of widespread public interest since 1996. *See* U.S. Court of Appeals for the Ninth Circuit, *Guidelines for Photographing, Recording, and Broadcasting in the Courtroom, at* http://www.ca9.uscourts.gov/content/view.php?pk_id=0000000110 (Supp. App. Ex. 1).

The public interest in this historic case has been overwhelming from the outset. Due to that widespread public interest, Chief Judge Walker informed the parties as early as September 25, 2009—long before any witnesses were designated—of the court's desire to "set up an arrangement whereby the images of counsel, the witness, and the judge can be relayed into another courtroom . . . which has a substantial amount of seating capacity." C.A. App. Ex. 9, at 69. When Chief Judge Walker pointed out at the September 25 hearing that there were three cameras in the courtroom positioned "approximately where they would be" during the trial and asked if anyone had an objection, the parties—including Proponents—stated that they did not. *Id.* at 70; *see also id.* ("No objection. None at all."). Thus, Proponents had notice of cameras in the courtroom as early as September, and they did not object.

During the September 25 hearing, Chief Judge Walker also explained that he had "received some inquiries . . . about projecting this image even beyond an overflow courtroom." C.A. App. Ex. 9, at 70. He asked the parties to consider that possibility and inform the court of their views. He also noted that "what we do is open and public and should be, but we want to do it in a way that's consistent with the rights of the parties and the appropriate decorum and dignity of the judicial process." *Id.*

On October 2, 2009, Plaintiffs submitted a letter to the court stating that they supported the contemplated video transmission of the proceedings beyond the overflow courtroom. C.A. App. Ex. 10. In addition, Plaintiff-Intervenor City of San Francisco, Defendant California Attorney General Edmund G. Brown, and Defendants Counties of Los Angeles and Alameda supported Plaintiffs' position. *Id.* On October 5, 2009, Proponents submitted a letter expressing their opposition to video transmission of the proceedings. C.A. App. Ex. 11.

On October 22, 2009, "Chief Judge Kozinski . . . appointed a committee to evaluate the possibility of adopting a Ninth Circuit rule" regarding the recording and transmission of district court proceedings. C.A. App. Ex. 2, at 43. The committee consisted of Circuit Judge Sidney Thomas, Chief Judge Audrey Collins of the Central District of California, and Chief Judge Walker. *Id.* at 44. The committee "made a recommendation to the Ninth Circuit Judicial Council, which *unanimously* adopted the rule . . . permitting a pilot project" regarding the recording and transmission of civil non-jury trials. *Id.* (emphasis added).[1]

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[1] The Ninth Circuit Judicial Council consists of eleven judges: Chief Judge Alex Kozinski, Senior Circuit Judge Proctor Hug, Jr., Circuit Judge Sidney R. Thomas, Circuit Judge M. Margaret McKeown, Circuit Judge Johnnie B. Rawlinson, Circuit Judge Ronald M. Gould, Senior District Judge Robert H. Whaley, Chief District Judge Roger L. Hunt, Chief District Judge Irma E. Gonzalez, Chief District Judge Audrey B. Collins, and Senior District Judge Terry J. Hatter, Jr. Chief Judge Walker is one of the nine non-voting observers of the Council. *See* The Judicial Council of the Ninth Circuit, *at* http://www.ce9.uscourts.gov/ judicial_council.html.

On December 17, 2009, the Ninth Circuit Judicial Council announced its decision to establish a pilot program that "allow[s] the 15 district courts within the Ninth Circuit to experiment with the dissemination of video recordings in civil non-jury matters." C.A. App. Ex. 13. Cases to be included in the program "will be selected by the chief judge of the district court in consultation with the chief circuit judge." *Id.*

In light of that authorization, the Northern District revised its Local Rule 77-3 on December 22, 2009, to provide that, "[u]nless allowed by a Judge or a Magistrate Judge . . . *for participation in a pilot or other project authorized by the Judicial Council of the Ninth Circuit*, the taking of photographs, public broadcasting or televising . . . in connection with any judicial proceeding[ ] is prohibited." C.A. App. Ex. 14 (revisions italicized). As Chief Judge Walker explained during the January 6 hearing in this case, the Northern District "amended Local Rule 77-3, to permit participation in that Ninth Circuit pilot project. At that time, we considered that to be a conforming amendment. Our rules, of course, conform and must conform to the Federal rules and to the Ninth Circuit rules." C.A. App. Ex. 2, at 44.

In accordance with the requirements of 28 U.S.C. § 2071(e), the Northern District provided public notice and an opportunity to comment on the revision to Local Rule 77-3, setting January 8, 2010, as the deadline for comments. C.A. App. Ex. 17. Plaintiffs and Proponents also submitted letters to the district court expressing their respective positions on the amendment and the recording of the proceedings. *See* Doc # 327 (Supp. App. Ex. 2); C.A. App. Ex. 15; C.A. App. Ex. 18.

On January 6, 2010, the district court held a hearing regarding the video recording of the trial and possible transmission beyond the courthouse. At the hearing, the court proposed recording the trial proceedings using three small video cameras—the same cameras to which Proponents did not object during the September 25 hearing (C.A. App. Ex. 9, at 69-70)—and transmitting the images to an overflow courtroom in the Northern District of California's San Francisco courthouse and to other federal courthouses across the country; the court further proposed making the images available (after a delay of up to twenty-four hours) on YouTube, a popular Internet site that disseminates video footage to the general public. C.A. App. Ex. 2, at 16; *see also id.* at 6. The district court also denied a request, however, by a broad media coalition to broadcast the proceedings live on television, explaining that "it's important for this process to be completely under the Court's control, to permit the Court to stop it if that proves to be a problem, if it proves to be a distraction, if it proves to create problems with witnesses." *Id.* at 45.

The district court formally notified the parties on January 7, 2010, that, pending the approval of Chief Judge Kozinski, video recordings of the trial proceedings would be transmitted in accordance with the plan set forth by the court at the hearing a day earlier. C.A. App. Ex. 1. On January 8, Proponents filed a petition for a writ of mandamus in the Ninth Circuit seeking an order barring the recording of the trial proceedings for public distribution in other courtrooms and on the Internet. After calling for a response from Plaintiffs, the court of appeals denied the petition the same day. Proponents' Ex. A.

Also on January 8, Chief Judge Kozinski issued an order authorizing the broadcast of the trial proceedings to selected courthouses. The order did not, however, authorize

the district court to make the recordings available on the Internet, noting only that "[t]he request for posting the files of the videos on the district court's website is still pending." *In re Pilot Dist. Court Public Access Program Approved December 16, 2009*, No. 2010-2 (9th Cir. Jan. 8, 2010) (Kozinski, C.J.) (Supp. App. Ex. 3). In a press release regarding the video transmissions issued the same day, the Ninth Circuit explained that the district court "will fully control the process" and that "Judge Walker has reserved the right to terminate any part of the audio, or video, or both, for any duration," or to terminate participation in the pilot program "at any time." News Release, Federal Courthouses to Offer Remote Viewing of Proposition 8 Trial (Jan. 8, 2010), *at* http://www.ce9.uscourts.gov/index.html (Supp. App. Ex. 4).

On Saturday, January 9, 2010, Proponents filed their application requesting a stay pending the filing and disposition of a petition for a writ of certiorari from the Ninth Circuit's order denying a writ of mandamus. At the time of this filing, the district court's request to publicly distribute the recorded trial proceedings on the Internet remains pending before Chief Judge Kozinski.

II. REASONS FOR DENYING THE STAY

"Denial of . . . in-chambers stay applications is the norm; relief is granted only in 'extraordinary cases.'" *Conkright v. Frommert*, 129 S. Ct. 1861, 1861 (2009) (Ginsburg, J., Circuit Justice). To obtain a stay pending the filing and disposition of a petition for a writ of certiorari, "the applicant must demonstrate (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction; (2) a fair prospect that a majority of the Court will conclude that

the decision below was erroneous; and (3) a likelihood that irreparable harm [will] result from the denial of a stay. In addition, in a close case it may be appropriate to balance the equities—to explore the relative harms to applicant and respondent, as well as the interests of the public at large." *Id.* at 1861-62 (internal quotation marks omitted; alteration in original). Each of those factors weighs strongly against a stay in this case.

A. Proponents' Request For A Stay Is Premature.

As an initial matter, Proponents' stay application should be denied because it is premature. Proponents seek a stay of "the district court's order permitting the proceedings in this case to be publicly broadcast on YouTube." Stay App. 25. Under the terms of the Ninth Circuit Judicial Council's pilot program, however, the district court's order cannot go into effect unless it is approved by Chief Judge Kozinski. Because Chief Judge Kozinski has not yet determined whether to approve the district court's request for authorization to record and publicly distribute the trial proceedings in this case on the Internet, there is no lower-court order for this Court to stay.

When the Ninth Circuit Judicial Council announced the introduction of its pilot program, it explained that cases "to be considered for the pilot program will be selected by the chief judge of the district court in consultation with the chief circuit judge." C.A. App. Ex. 13. In accordance with the terms of the program, the district court notified the parties on January 7, 2010, that it had "formally requested the Chief Judge of the Ninth Circuit to approve inclusion of the trial in the pilot project on the terms and conditions discussed at the January 6, 2010 hearing," which would provide for recording of the trial proceedings for public distribution in an overflow courtroom in the Northern District of

California's San Francisco courthouse and other federal courthouses across the country, and on the Internet. C.A. App. Ex. 1. On January 8, 2010, Chief Judge Kozinski issued an order that granted the district court's request, "*limited to* real-time live streaming to federal courthouses to be designated by the Circuit and Court of Appeals Executive." Supp. App. Ex. 3 (emphasis added). Chief Judge Kozinski explained that the "request for posting the files of the videos on the district court's website is still pending." *Id.*

Because Chief Judge Kozinski has not yet decided whether to approve the district court's request that the trial proceedings be recorded and publicly disseminated on the Internet, it is premature for Proponents to seek a stay of "the district court's order permitting the proceedings in this case to be publicly broadcast on YouTube." Stay App. 25. Unless Chief Judge Kozinski approves the recording and subsequent Internet distribution of the trial proceedings, that public distribution will not take place and the district court's order permitting that distribution will lack all legal force and effect. Accordingly, there is nothing for this Court to stay at this time.

B. There Is No Reasonable Probability That This Court Would Grant Certiorari And Reverse The Court Of Appeals' Denial Of Proponents' Mandamus Petition.

Even if Chief Judge Kozinski were to approve the recording and subsequent Internet distribution of the trial proceedings while Proponents' stay application is pending, the application should still be denied because there is no reasonable probability that this Court would grant certiorari and reverse the court of appeals' decision not to issue a writ of mandamus barring that transmission. In the event that Chief Judge Kozinski approves the recording and public distribution of the trial proceedings on the

Internet, that transmission would be authorized by both the district court's local rules and the policy of the Ninth Circuit Judicial Council, and would not impair Proponents' due process rights.

Proponents do not attempt to satisfy any of the traditional criteria that this Court uses to evaluate whether to grant a petition for a writ of certiorari. Proponents do not even suggest that the Ninth Circuit's denial of mandamus conflicts with the decisions of other circuits or the decisions of this Court. Proponents instead contend that this Court would likely grant their forthcoming petition for certiorari—and reverse the Ninth Circuit's denial of mandamus—as "'an exercise of this Court's supervisory power'" over lower courts. Stay App. 11 (quoting S. Ct. R. 10(a)). But this Court generally exercises its "supervisory power" only when doing so is necessary to "establish[ ] and maintain[ ] civilized standards of procedure and evidence." *McNabb v. United States*, 318 U.S. 332, 340 (1943). Proponents have not demonstrated that the Ninth Circuit's denial of mandamus comes remotely close to presenting the exceptional circumstances that alone justify the exercise of this Court's supervisory power.

Indeed, the Ninth Circuit acted well within its broad discretion, and pursuant to "civilized standards," when it denied Proponents' request for a writ of mandamus prohibiting the recording and subsequent public distribution of the trial proceedings in this case. As this Court has emphasized, mandamus is a "drastic and extraordinary remedy reserved for really extraordinary causes" (*Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380 (2004) (internal quotation marks omitted)), and its "issuance . . . is in large part a matter of discretion with the court to which the petition is addressed." *Kerr v. U.S.*

Dist. Court, 426 U.S. 394, 403 (1976). "[O]nly exceptional circumstances amounting to a judicial usurpation of power or a clear abuse of discretion will justify the invocation of" mandamus. *Cheney*, 542 U.S. at 380 (internal quotation marks and citations omitted). To demonstrate that these "exceptional circumstances" are present, the party seeking mandamus must establish that the lower court committed "clear and indisputable" error and that it "ha[s] no other adequate means to attain the relief" being sought. *Id.* at 380-81 (internal quotation marks omitted). Proponents cannot make either of those showings in this case.

1. If approved by Chief Judge Kozinski, the district court's decision to record and publicly distribute the trial proceedings in this case would be authorized both by the Ninth Circuit Judicial Council and by the district court's local rules.

On December 17, 2009, the Ninth Circuit Judicial Council announced its decision to establish a pilot program that "allow[s] the 15 district courts within the Ninth Circuit to experiment with the dissemination of video recordings in civil non-jury matters." C.A. App. Ex. 13. Proponents challenge the validity of the Ninth Circuit Judicial Council's pilot program on the ground that the council did not provide a notice and comment period before establishing the program. But judicial councils are required to provide notice and comment only when issuing "general order[s] relating to practice and procedure" within the circuit (28 U.S.C. § 332(d)(1)), and, as Proponents concede, the Ninth Circuit Judicial Council "has not issued" a "general order" authorizing the broadcast of civil non-jury proceedings. Stay App. 23. Instead, it instituted a pilot program that is designed to assist the council in determining whether to issue an order that permanently authorizes the

broadcast of such proceedings. C.A. App. Ex. 13. Proponents point to nothing in 28 U.S.C. § 332 or any other statute that makes notice and comment a prerequisite to the establishment of such programs.

In accordance with the Ninth Circuit Judicial Council's pilot program, the Northern District of California revised its Local Rule 77-3 on December 22, 2009, to provide that, "[u]nless allowed by a Judge or a Magistrate Judge . . . *for participation in a pilot or other project authorized by the Judicial Council of the Ninth Circuit*, the taking of photographs, public broadcasting or televising . . . in connection with any judicial proceeding[ ] is prohibited." C.A. App. Ex. 19 (revisions italicized). That amendment was validly enacted pursuant to 28 U.S.C. § 2071(e), which provides that, "[i]f the prescribing court determines that there is an immediate need for a rule, such court may proceed under this section without public notice and opportunity for comment, but such court shall promptly thereafter afford such notice and opportunity for comment." The impending start of the trial in this case on January 11, 2010—and the overwhelming public interest in this case—unquestionably satisfy this "immediate need" provision.[2]

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[2] Even if the Northern District's amendment of Local Rule 77-3 did not comport with all the procedural requirements of 28 U.S.C. § 2071, the district court certainly did not commit a "clear abuse of discretion" when, in reliance on that amended rule, it requested permission from Chief Judge Kozinski to record the trial proceedings for public distribution in other courtrooms and on the Internet. *Cheney*, 542 U.S. at 380 (internal quotation marks omitted). Proponents locate *not one decision* in which a court of appeals has directed a district court to comply with a superseded local rule on the ground that the process amending that rule was invalid. This case is a far cry from *United States v. Terry*, 11 F.3d 110 (9th Cir. 1993), in which the court reversed the denial of a motion to suppress on the ground that the defendant "received no actual

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Under the Ninth Circuit Judicial Council's pilot program and amended Local Rule 77-3, the district court therefore possessed the authority to order the recording and public distribution of the trial proceedings in this case, subject to the approval of Chief Judge Kozinski. And, while it is the position of the Judicial Conference of the United States that cameras should not be permitted in federal district courts, that policy is not binding on the Ninth Circuit or the district court. *See Armster v. U.S. Dist. Court*, 806 F.2d 1347, 1349 n.1 (9th Cir. 1986) ("Except for judicial disciplinary proceedings, the Judicial Conference does not have binding or adjudicatory authority over the courts."). The nonbinding nature of the Judicial Conference's camera policy is confirmed by the fact that both the Southern District of New York and the Eastern District of New York have policies expressly authorizing judges to broadcast civil proceedings. *See* S.D.N.Y. Local Civ. R. 1.8; E.D.N.Y. Local Civ. R. 1.8.[3]

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notice" of a general order that made his motion untimely, but did not invalidate the general order as to those litigants who did have actual notice of it (as Proponents indisputably did here). *Id.* at 113. Indeed, *Terry* recognizes that, "in promulgating local rules, a district court has considerable latitude in calibrating its public notice method to the individual needs of its jurisdiction." *Id.* (internal quotation marks omitted). Moreover, Proponents complain that the opportunity for comment provided by the district court is "patently inadequate" (Stay App. 21), but, as they concede, they were first informed of the possibility that the trial proceedings would be recorded and publicly disseminated in September 2009, and have subsequently made their objections known at every available opportunity and in every available forum. *Id.* at 6.

[3] The Ninth Circuit's denial of mandamus is completely consistent with the First Circuit's decision in *In re Sony BMG Music Entertainment*, 564 F.3d 1 (1st Cir. 2009). In that case, a "controlling" local rule explicitly prohibited broadcast of "any

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Proponents are also wrong when they suggest that the recording and public dissemination of the trial proceedings in other courtrooms and on the Internet would impair their due process rights. Stay App. 24. Proponents' concerns about the possibility of compromised safety, witness intimidation, or harassment of trial participants are utterly unsubstantiated and groundless speculation.

As an initial matter, every one of the witnesses that Proponents have indicated they will call at trial is a *paid expert*. But Proponents designated these persons as their experts a week *after* the district court first suggested that it might record and publicly distribute the proceedings and after Plaintiffs had expressed support for such a broadcast. Doc # 160 at 2 (Supp. App. Ex. 6); C.A. App. Ex. 10. Surely, counsel for Proponents informed their paid experts of the possibility that the trial proceedings could be disseminated in other courtrooms and on the Internet, and it seems that those experts nevertheless agreed to testify. Indeed, given the very public profiles of many of Proponents' experts—for example, Proponents' expert David Blankenhorn has published numerous op-eds opposing marriage equality (*see, e.g.*, David Blankenhorn, *Protecting Marriage to Protect Children*, L.A. Times, Sept. 19, 2008), and their expert Loren Marks

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proceedings," and the district court's interpretation of that rule to *permit* a broadcast was "palpably incorrect." *Id.* at 4, 5, 10. Here, quite unlike *Sony*, the "controlling" local rule explicitly permits broadcast of civil non-jury trials designated as appropriate by the chief judges of the district court and the Ninth Circuit. Proponents' argument—that the "controlling" local rule was invalidly amended—was not remotely presented in *Sony*.

has a YouTube video discussing marriage (*see* http://www.youtube.com/watch?v=atVTejG6U_U)—it is hard to believe that those experts are not embracing the opportunity to communicate their views to the broadest possible audience. At a minimum, the publicity willingly sought by Proponents' paid experts deeply undermines the suggestion that any additional publicity they may receive as a result of the Internet rebroadcast of the trial proceedings will expose them to threats and harassment they otherwise would not have faced. *See United States v. Criden*, 648 F.2d 814, 825 (3d Cir. 1981) ("when the defendants themselves were public figures and their conduct was already the subject of national publicity and comment, we find the district court's concerns about the incremental effect of rebroadcast publicity to be unconvincing").

Furthermore, to the extent Proponents' concern is for adverse witnesses that Plaintiffs may call, those persons willingly thrust themselves into public view years ago by sponsoring Prop. 8 and orchestrating an expensive, sophisticated, and highly public multimedia campaign to amend the California Constitution. They certainly did not exhibit a similar fear of public attention when attempting to garner votes for Prop. 8 from millions of California voters, when touting their successful campaign strategy in post-election magazine articles and public appearances (*see* Supp. App. Ex. 5; http://www.youtube.com/ watch?v=ngbAPVVPD5k), or when voluntarily intervening in this case. In any event, many aspects of the trial—including opening and closing arguments and testimony by the parties' experts—will not even remotely implicate Proponents' purported witness-related concerns. And, the district court indicated that, should it determine that witness issues or other factors militate against permitting camera

coverage of particular portions of the trial, it can and will limit transmission of those parts of the trial to the public. *See* C.A. App. Ex. 2, at 44-45.

2. In light of the authority granted to the district court by its Local Rules and the Ninth Circuit Judicial Council—and the absence of any factual or legal support for Proponents' due process arguments—the Ninth Circuit correctly concluded that the district court did not err when it requested Chief Judge Kozinski's approval to record and publicly distribute the trial proceedings in other courtrooms and on the Internet. But even if the transmission of the trial proceedings would constitute a "clear and indisputable" violation of either the applicable procedural rules or due process—and it certainly does not—the Ninth Circuit would still have been correct to deny mandamus because Proponents have "other adequate means to attain the relief" being sought. *Cheney*, 542 U.S. at 380, 381 (internal quotation marks omitted).

If, as Proponents allege, the recording and transmission of the trial proceedings would impair their right to a fair trial, Proponents—like any other litigant who has been prejudiced by deficient trial procedures—would have the opportunity to seek full relief on a motion for a new trial and subsequent appeal. Indeed, this Court has expressly held that post-trial review provides litigants with a meaningful opportunity to challenge a court's authorization of cameras during trial proceedings. *See Chandler v. Florida*, 449 U.S. 560, 581 (1981) (holding that television coverage of a criminal trial did not impair defendants' due process rights, while emphasizing that a "defendant has the right *on review* to show that the media's coverage of his case—printed or broadcast—compromised the ability of the jury to judge him fairly") (emphasis added). The

mandamus relief sought by Proponents—and properly denied by the Ninth Circuit—was therefore unnecessary.

C. Proponents Will Not Be Irreparably Harmed In The Absence Of A Stay.

In addition to failing to establish any reasonable likelihood that this Court will grant review, Proponents have failed to demonstrate that they would be irreparably harmed in the absence of a stay.

As explained above, Proponents' assertions that the recording and subsequent public distribution of the trial proceedings would expose Proponents and their paid expert witnesses to threats and harassment are completely unfounded. The identity of Proponents and their experts—and their position on the issues to be litigated in this case—are already well known to the public, and thus the hypothesized risks posited by Proponents would not be materially increased by the recording and transmission of the trial proceedings. And any prejudice that such public dissemination of the proceedings might have upon Proponents' procedural due process rights could be fully remedied on appeal. *Chandler*, 449 U.S. at 581. In light of the absence of any showing of irreparable harm, a stay is not warranted.

D. The Balance Of Equities Weighs Against A Stay.

Finally, the balance of equities weighs against a stay because there is a strong interest in providing the public with meaningful access to the trial proceedings in this exceedingly important case.

Recording and publicly distributing this bench trial in other courtrooms and on the Internet will promote deeply rooted First Amendment principles that favor broad public access to judicial proceedings. Indeed, this Court has recognized that a "trial is a public event" and that "[w]hat transpires in the court room is public property." *Craig v. Harney*, 331 U.S. 367, 374 (1947). Because "it is difficult for [people] to accept what they are prohibited from observing" (*Richmond Newspapers v. Virginia*, 448 U.S. 555, 572 (1980) (op. of Burger, C.J.)), the First Amendment guarantees free and open access to judicial proceedings in order to foster public confidence in the judicial system. Broad public access to judicial proceedings also "protect[s] the free discussion of governmental affairs" that is essential to the ability of "the individual citizen . . . [to] effectively participate in and contribute to our republican system of self-government." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982) (internal quotation marks omitted).

In light of the great public interest in the issues to be decided in this case, providing a broadcast of the proceedings is the most effective means of affording the public its constitutionally guaranteed right of access. More than 13 million Californians cast a vote for or against Prop. 8. And there are hundreds of thousands of gay and lesbian Californians who have a direct stake in the outcome of this case. Far from detracting

from the right of public access, the "highly contentious" character of the issues to be resolved in this case (Stay App. 24) underscores the importance of providing the public with a meaningful window into the trial proceedings so it can see and hear what is happening in the courtroom. *See Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508 (1984) ("The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed"). The "ability to see and to hear a proceeding as i[t] unfolds is a vital component of the First Amendment right of access." *ABC, Inc. v. Stewart*, 360 F.3d 90, 99 (2d Cir. 2004).

III. CONCLUSION

For the foregoing reasons, the Application for Immediate Stay should be denied.

Respectfully submitted.

/s/ Theodore B. Olson

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